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In the Supreme Court of the United States

OCTOBER TERM, 1976

OLSON FARMS, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinions of the district court (Pet. App. A-1 to A-14) and the court of appeals (Pet. App. B-1 to B-13) are not yet reported. The order of the Judicial Council of the Tenth Circuit (Pet. App. C-1 to C-2) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 1976. The order of the Judicial Council was filed on July 30, 1976. The petition for a writ of certiorari was filed on September 3, 1976. Because this is a petition to review the issuance of a writ of mandamus requiring a judge to recuse himself in a criminal case, Rule 22(2) of the Rules of this Court applies, and the petition is out of

time.[1] Petitioner invokes this Court's jurisdiction under 28 U.S.C. 1254(1).[2]

QUESTIONS PRESENTED

1. Whether petitioner may seek review in its own name of a writ of mandamus removing a district judge from further proceedings in a criminal case in which it is a defendant.

2. Whether this Court has jurisdiction to review by writ of certiorari an order of a circuit judicial council removing a judge from a case.

3. Whether the court of appeals and the judicial council properly removed the district judge after concluding that his impartiality might reasonably be questioned.

STATUTES INVOLVED

28 U.S.C. 144, 332, and 455(a) are set out at Pet. 2-3.

STATEMENT

1. An indictment filed in the United States District Court for the District of Utah on July 28, 1975, charged that six defendants, including petitioner, had engaged in a criminal combination and conspiracy to fix egg prices, in violation of Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1. The defendants were arraigned on November 24, 1975, before Chief Judge Willis W. Ritter, who granted certain defendants' motions for

[1]The court of appeals stayed issuance of its mandate on condition that a petition for certiorari be filed by September 3, 1976. This stay did not, however, extend the time within which to file a petition. Petitioner could have filed a timely petition within the stay granted by the court of appeals, but only by seeking an extension of time in this Court.

[2]Petitioner refers (Pet. 2) to "28 U.S.C. Section 1234(1)," but that is apparently a printer's error.

bills of particulars, assigned the case to himself for trial, and set February 2, 1976, as the first date of trial.

Petitioner was represented at the hearing by Harold G. Christensen, then president of the Utah State Bar. At the annual meeting of the Utah State Bar on June 20-21, 1975, several resolutions either directly or indirectly concerning Judge Ritter had been introduced. One of the resolutions called for the State Bar to recommend to the United States House of Representatives that it investigate the appropriateness of starting impeachment proceedings against Judge Ritter; another recommended that the Judicial Council of the Tenth Circuit (the "Judicial Council") investigate the judge's ability efficiently to discharge his duties (Pet. App. B-2 n. 2). The resolutions were referred to the Bar Commission, of which Mr. Christensen was a member and presiding officer (Pet. App. B-2 to B-3).

On December 17, 1975, the Commission referred the resolutions to the Executive Committee, a three-man body of which Mr. Christensen was chairman (Pet. App. B-3). On December 27, 1975, this committee held a hearing and unanimously voted to recommend that the Bar Commission oppose the impeachment and disability resolutions (*ibid.*).[3] A week later Mr. Christensen, at the request of the committee, personally delivered copies of the proposed resolutions to Judge Ritter (*ibid.*). On

[3]The Executive Committee also opposed two other resolutions recommending action adverse to Judge Ritter (Pet. App. B-3). The committee took no position on a resolution calling for repeal of a "grandfather" clause enabling Judge Ritter to sit as Chief Judge of the District despite being over the age of 70 (*ibid.*). See 28 U.S.C. 136 and Act of August 6, 1958, Section 3, 72 Stat. 497. The committee endorsed a resolution approving legislation that would provide an alternative to impeachment as a means of removing a judge not exercising good behavior (Pet. App. B-3).

January 8, 1976, the Bar Commission unanimously adopted the Executive Committee's recommendations (*ibid.*). On January 10, 1976, at the mid-year meeting of the State Bar, Mr. Christensen presented the Commission's recommendations; the State Bar defeated the impeachment and disability resolutions by votes of 100 to 71 and 106 to 64 (*ibid.*; App. 40).[4]

On January 16, 1976, Judge Ritter held a motions session. The defendants, with Mr. Christensen as chief spokesman, sought further bills of particulars, asserting that the government had not complied with earlier requests. Judge Ritter, in granting the defendants' requests, treated Mr. Christensen with deference while curtly and caustically cutting off government counsel before he could explain his position (Pet. App. B-8).

2. After this motions session government counsel learned of the State Bar impeachment and disability resolutions against Judge Ritter, and of Mr. Christensen's role in the State Bar's defeat of those resolutions (Pet. App. B-2; App. 76-77).[5]

On January 23, 1976, the United States requested Judge Ritter to disqualify himself, pursuant to 28 U.S.C. 144 and 455(a) (App. 1-2). The motion, accompanied by a lengthy affidavit (App. 3-19), stated that there was reason to believe that Judge Ritter was biased in favor of Mr. Christensen and biased against the Antitrust Division of the United States Department of Justice. The government also asked Judge Ritter to rule promptly and to stay further proceedings pending his ruling (App. 2).

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[4]"App." refers to the appendix in the court of appeals.

[5]The United States Attorney for the District of Utah had been aware of the resolutions, but he had taken no part in the prosecution of the case and had not informed the lawyers handling the case of the resolutions.

Judge Ritter did not rule on the motion, did not indicate when he would rule, and did not stay the start of the trial. On January 29, 1976, the United States, fearful that Judge Ritter would start the trial on February 2 without ruling on the motion, petitioned for a writ of mandamus from the court of appeals to compel the judge to rule promptly (Pet. App. B-4).[6] Immediately upon receiving notice of the petition, Judge Ritter scheduled a hearing on the government's motion for the afternoon of January 30, 1976 (*ibid.*).[7]

Judge Ritter began that hearing by denying the government an opportunity to be heard on its motion (App. 81) —although the judge himself had listed it as the first item of business (App. 78)—and by asking Mr. Christensen for his preference on the order of proceedings. When Mr. Christensen declined to express a preference, Judge Ritter allowed the government to argue the issue of disqualification (Pet. App. B-4; App. 81-88). After ruling against the government's argument for disqualification under 28 U.S.C. 144,[8] he ordered the government attorney who had sworn to the affidavit attached to the disqualification motion to take the stand for cross-examination by Mr. Christensen (Pet. App. B-4). Judge Ritter

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[6]In a recent criminal trial, *United States* v. *Lansing and Farley*, D. Utah, Cr. No. 75-120, Judge Ritter had refused to consider pretrial motions prior to trial. The court of appeals issued a writ of mandamus directing the judge to rule on the motions prior to trial. *United States* v. *Ritter*, C.A. 10, No. 76-1011, mandamus issued May 20, 1976.

The prosecution's concern in this case, and others like it, is that a disqualification ruling during the course of a criminal trial is effectively unreviewable.

[7]He also scheduled for hearing at the same time defendants' motion to cross-examine the government's affiant, to dismiss the indictment, and to suppress evidence (App. 78).

[8]Judge Ritter withdrew this ruling after learning that the clerk of the court of appeals wished to be informed of district court proceedings (App. 88).

then demanded that the chief government attorney, Gary R. Spratling, take the stand to testify concerning publicity attendant upon the judge's dismissal of the grand jury that indicted the defendants and the filing of the disqualification motion (App. 147-157).[9] The judge then "made a very deferential apology to Mr. Christensen" (Pet. App. B-4) and told the government attorney that "[n]ow you have only begun to see what I am going to do about this, Mr. Spratling" (App. 156).

At this point Judge Ritter, without ruling on disqualification or other pending motions, adjourned the hearing to Saturday morning. The court of appeals stayed the trial (Pet. App. B-4).

3. On March 29, 1976, Judge Ritter issued an opinion and order denying the government's motion for disqualification (Pet. App. A-1 to A-14). Although the opinion set

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[9]On December 4, 1975, Judge Ritter, over the objection of the prosecutors and of the grand jurors themselves, dismissed before completion of its term the grand jury that had indicted the defendants (App. 71). The foreman and another member of the grand jury were quoted in the press and on television as being very disappointed that Judge Ritter had blocked the grand jury from finishing its investigation (App. 71). The prosecutors, however, did not encourage the grand jurors to make these statements, and they were not responsible for the publicity given to the disqualification motion (App. 148, 118).

The United States subsequently asked Judge Ritter to convene a new grand jury; when he declined to act, it petitioned for a writ of mandamus directing him to convene a new grand jury and not improperly to interfere with its functioning. *United States* v. *Ritter*, C.A. 10, No. 76-1331. On April 29, 1976, the court, noting that Judge Ritter had meanwhile convened a grand jury, retained jurisdiction over Judge Ritter's supervision of the grand jury. It has now issued a writ of mandamus directing Judge Ritter to discontinue certain unreasonable restraints he had imposed on the appearance of counsel before the grand jury. *United States* v. *Ritter*, C.A. 10, No. 76-1331, mandamus issued September 10, 1976.

out several hypertechnical reasons for denying the motion, its major premise was that disqualification under 28 U.S.C. 455(a) is available only when all the requirements of Section 144 also have been met, and that none of those requirements had been met (Pet. App. A-6 to A-13).

4. The United States petitioned for a writ of mandamus to disqualify Judge Ritter.[10] The court of appeals, in a unanimous *en banc* opinion, removed Judge Ritter under 28 U.S.C. 455(a).[11] The court held that "in the light of the total facts" there was not a reasonable likelihood that the case would be tried "with the impartiality that litigants have a right to expect in a United States district court" (Pet. App. B-11).

The court noted the resolutions involving Judge Ritter and Mr. Christensen's role in the State Bar's handling of them (Pet. App. B-2 to B-3, B-7 to B-8). Although it held that Mr. Christensen's conduct in the matter was not improper, it described Judge Ritter's attitude toward Mr. Christensen after the defeat of the resolutions as "friendly," "deferential," and even "apologetic" (Pet. App. B-10, B-8). At the same time Judge Ritter was "curt" to government counsel on January 16, 1976; at the January 30, 1976, hearing he was "indeed caustic and overbearing" (Pet. App. B-8 to B-9).[12] The court observed that this behavior "might foretell injudicious and partisan conduct at trial" (Pet. App. B-9, B-11).

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[10]Judge Ritter did not respond to the mandamus petition. Four of the six defendants, including petitioner, filed an answer.

[11]Although the case was argued to a panel of three judges, the panel submitted its opinion and order to the rest of the judges of the court, who approved them (Pet. App. B-12).

[12]The court noted that "such displays are not infrequent or uncommon" (Pet. App. B-9).

The court also reflected upon its experience with Judge Ritter in the "horse cases,"[13] where it removed him because of his unwillingness to give the United States a fair and impartial trial (Pet. App. B-10 to B-11). Based upon all the facts of this case and its general knowledge of the judge from prior cases, the court of appeals concluded that "the interests of justice require that the cause be tried by another judge" (Pet. App. B-12).[14]

5. On July 30, 1976, the Judicial Council, on referral from the court of appeals, concluded that there is a reasonable likelihood that Judge Ritter would not try the case impartially. In the interests of justice it ordered that he be replaced by another judge (Pet. App. C-1 to C-2).

ARGUMENT

1. Petitioner has no legal interest in the question whether Judge Ritter or some other judge presides in its criminal trial. It therefore is not entitled to challenge the writ of mandamus issued by the court of appeals. Although petitioner was a party in the mandamus proceedings by virtue of Fed. R. App. P. 21(b), we believe that it lacks standing to raise the arguments it now presents.

Standing requires two distinct showings: that the party allege injury in fact, and that the party be the proper

[13] *United States* v. *Hatahley*, 257 F. 2d 920 (C.A. 10), reversed in part, 351 U.S. 173; *United States* v. *Ritter*, 273 F. 2d 30 (C.A. 10), certiorari denied, 362 U.S. 950.

[14] The court directed that a judge from outside the district of Utah hear the case, because Judge Anderson, the only other district judge in active service in Utah, presided at the trial of a private antitrust suit in which petitioner was a defendant. *Cackling Acres, Inc.* v. *Olson Farms, Inc.*, D. Utah, Civ. No. C-296-71. The court of appeals affirmed that treble damage judgment of $1.7 million. *Cackling Acres, Inc.* v. *Olson Farms, Inc.*, C.A. 10, No. 74-1850, decided August 31, 1976.

proponent of the legal rights asserted. *Singleton* v. *Wulff*, No. 74-1393, decided July 1, 1976. Cf. *Simon* v. *Eastern Kentucky Welfare Rights Organization*, No. 74-1124, decided June 1, 1976. Petitioner fails on both counts.

First, it does not allege that disqualification of Judge Ritter would injure it.[15] It does not contend that only Judge Ritter can give it a fair trial; it does not contend that Judge Winner, Judge Ritter's replacement, will not give it a fair trial. Petitioner may believe that the court of appeals' action is not the proper way to administer justice, but this type of concern is no different from that of any citizen, and "motivation is not a substitute for the actual injury needed * * * ." *Schlesinger* v. *Reservists Committee To Stop The War*, 418 U.S. 208, 226.

Second, petitioner has no legally protected interest in the retention of Judge Ritter.[16] Petitioner is still assured a fair trial before an impartial judge; as it admitted to the court of appeals, it has "no appropriate interest or choice concerning the Judge assigned to these proceedings * * *."[17]

2. The only judgment of which review is sought is "the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on July 14, 1976" (Pet. 1; cf. Pet. 12). Petitioner has not sought

[15] Indeed, the only conceivable injury petitioner could suffer would be through the "loss" of a judge biased in petitioner's favor. That, of course, is not a cognizable legal interest.

[16] This is not to say that nobody has an interest in Judge Ritter's disqualification. Judge Ritter, whom the court of appeals removed and criticized, would be entitled to seek review of the court of appeals' order. Judge Ritter, however, did not appear in the court of appeals and has not sought review in this Court; his time for doing so has expired.

[17] Respondent's Answer, p. 23.

review of the order of the Judicial Council, which was issued on July 30, 1976. A judgment of this Court reversing the Tenth Circuit therefore would avail petitioner nothing, for the Judicial Council's order still would stand.[18]

3. The decision of the court of appeals is correct. It depends upon the facts of this case and the Tenth Circuit's intimate knowledge of the behavior of Judge Ritter, and it does not warrant review by this Court.

The court of appeals, after careful consideration of all circumstances, concluded that there was not a "reasonable likelihood that the cause will be tried with the impartiality that litigants have a right to expect in a United States district court" (Pet. App. B-11). There is ample ground for this determination based upon the impeachment and disability resolutions; Mr. Christensen's role in the State Bar proceedings which led to defeat of the resolutions; Judge Ritter's subsequent deference to Mr. Christensen and curtness to government lawyers; and Judge Ritter's behavior in prior proceedings. In these circumstances the court of appeals' judgment that the interests of justice required the appointment of a new judge was justified. It is entitled to particular deference because of the "familiarity of a court of appeals with the practice of the individual district courts within its circuit" (*Will* v. *United States*, 389 U.S. 90, 105).

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[18] Although petitioner questions the order of the Judicial Council (Pet. 11-12), it cannot be reviewed by certiorari, because 28 U.S.C. 1254 provides for review only of "[c]ases in the courts of appeals." A judicial council is not a court of appeals, and, although it is not clear whether orders of a judicial council are directly reviewable by this Court, it is quite clear that, if they are reviewable, review must be by extraordinary writ. *Chandler* v. *Judicial Council*, 398 U.S. 74, 83 n. 5, 86 n. 7. Petitioner has not sought such a writ, and this is not the sort of extraordinary case that would make its issuance by this Court appropriate.

Petitioner does not dispute the court of appeals' conclusion that Judge Ritter's impartiality might reasonably be questioned. It argues only that the court improperly considered certain matters in deciding to remove the judge. These arguments are unsound.

a. Petitioner argues (Pet. 8-9) that the court of appeals' disqualification of Judge Ritter was not based on "extrajudicial" matters and thus is contrary to *Berger* v. *United States*, 255 U.S. 22, and *United States* v. *Grinnell Corp.*, 384 U.S. 563. This contention misreads both this Court's cases and the court of appeals' decision.

In *Berger* the Court held that "the bias or prejudice which can be urged against a judge must be based upon something other than rulings in the case." 255 U.S. at 31. It went on to hold that the judge's statement about the disloyalty of German-Americans was sufficient to disqualify him in the trial of several Americans of German birth or descent. *Id.* at 28-29, 36. In *Grinnell* the Court held that a judge's statements that the government's case, if proven, would merit stringent relief, were not a basis for disqualification. 384 U.S. at 583. The Court noted that the judge's allegedly biased views came from his reading of the pleadings and depositions, and, citing *Berger*, it wrote that bias "to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *Ibid.*

The court of appeals' decision comports with *Berger* and *Grinnell*. The court did not act on the basis of Judge Ritter's "rulings in the case itself" (Pet. 8). Rather, the court relied on a cluster of facts, all of which may properly be considered: the impeachment and hostile attitude toward government lawyers; the judge's past history of partisan behavior (Pet. App. B-5,

B-10 to B-11). Together, even if not separately, these events were enough to call Judge Ritter's impartiality into reasonable question.

We do not understand petitioner to dispute that the first two factors are extrajudicial. Petitioner does contend that consideration of the judge's behavior toward counsel was erroneous because it encompassed "in-court statements" (Pet. 8). But a court need not close its eyes to the import of judicial statements just because they were made in court. This Court disqualified the judge in *Berger* on the basis of statements made in court. The judge's statements, especially in light of his conduct in other cases, are properly considered in determining whether the judge's impartiality is subject to reasonable question.[19]

b. Petitioner also contends (Pet. 9-10) that bias for or against counsel may not be considered under 28 U.S.C. 455(a), and that the court of appeals' consideration of this matter conflicts with *Davis* v. *Board of School Commissioners of Mobile County*, 517 F. 2d 1044 (C.A. 5), rehearing denied, 521 F. 2d 814, certiorari denied, April 19, 1976 (No. 75-1084). Although the United States believes that both the purposes and the legislative history of 28 U.S.C. 455(a) show that it allows consideration of a judge's attitude toward counsel, there is no need to belabor the point here. The alleged conflict between the circuits is illusory.

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[19]The rule that bias, to be disqualifying, must be extrajudicial in origin does not mean that nothing that happens in the courtroom is relevant. "The judge's behavior during the trial may demonstrate the existence of a personal bias." 13 Wright & Miller, *Federal Practice and Procedure* 353 (1975).

Davis held that an assertion by two parties that a judge had criticized the merits of certain of their lawyers' lawsuits and motions did not constitute grounds for disqualification. The court of appeals relied upon both the absence of extrajudicial bias and the legal insufficiency of bias against an attorney as ground for disqualification. *Davis, supra,* 517 F. 2d at 1050-1052.

Davis concerned the propriety of considering judicial bias *against* an attorney, not bias in his favor. The court reasoned that if bias against an attorney were cause for disqualification, a lawyer who (perhaps intentionally) provoked a judge's hostility would gain a "peremptory challenge" and could "decimate the bench." 517 F. 2d at 1050.

Bias in favor of an attorney produces an entirely different situation, for the challenging party cannot create the conditions that give rise to disqualification. The only potential conflict between *Davis* and the instant case, then, concerns judicial hostility toward a specific attorney.[20] That narrow problem is not presented by this case.

As the court of appeals made clear, its disqualification of Judge Ritter was based on several factors, only one of which was his hostility toward governmental counsel. That hostility was a counterpart to his deference to Mr. Christensen, and both kinds of behavior took place in the context of the resolutions relating to Judge Ritter and Mr. Christensen's role in their defeat. Nothing

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[20]To the extent that petitioner suggests that the Fifth Circuit has taken the position that the test for disqualification under Section 455(a) is identical to that under the older Section 144 (Pet. 9), the suggestion is incorrect. See *Parrish* v. *Board of Commissioners of Alabama State Bar*, 524 F. 2d 98, 103-104 (C.A. 5) (*en banc*).

remotely similar was involved in *Davis*, and there is no reason to believe that the Fifth Circuit, presented with the facts of this case, would have allowed Judge Ritter to continue to preside.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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